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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 909

ADOLPHUS HOHENSEE, AN INDIVIDUAL, EL RANCHO ADOLPHUS PRODUCTS, INC., SCIENTIFIC LIVING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–10a)[1] is not yet reported. The opinion of the District Court denying petitioners' motions for arrest of judgment and for a new trial (App. 41a–51a) is reported at 140 F. Supp. 645.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1957 (Pet. App. 2a). A petition for

[1] The appendix to the petition for a writ of certiorari is designated as "Pet. App.". The appendix of the appellants in the Court of Appeals, which forms a part of the record filed with this Court, is designated as "App.". The transcript of the trial record is designated as "Tr.".

rehearing was denied on March 1, 1957 (Pet. App. 12a). On March 22, 1957, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 15, 1957, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioners were convicted of misbranding drugs in violation of the Federal Food, Drug, and Cosmetic Act, in that the drugs did not contain adequate directions for use when they were introduced into interstate commerce. Included in the evidence to show that these products were drugs were representations to that effect made by petitioner Hohensee at lectures given very shortly after the goods were introduced into interstate commerce, and literature disseminated at these lectures. The questions presented are:

1. Whether these representations and pieces of literature were relevant to show that the products were drugs when introduced into interstate commerce.

2. Whether the indictment was properly drawn under Section 301 (a) of the Act.

3. Whether Section 502 (f) (1) of the Act was properly construed as requiring that the labels of the drugs must enumerate the purposes, conditions, and diseases for which the drugs are intended.

4. Whether it was prejudicial error to submit to the jury a photostatic copy of the indictment with those portions relating to petitioner Hohensee's prior conviction blocked out.

5. Whether criminal intent is a necessary requisite in establishing violation of the Federal Food, Drug, and Cosmetic Act.

6. Whether the evidence supported the convictions.

7. Whether the trial was fairly conducted.

STATUTE AND REGULATION INVOLVED

Section 201 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040–1041, 21 U. S. C. 321, provides in pertinent part:

> For the purposes of this Act—
>
> * * * * *
>
> (g) The term "drug" means * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; * * *
>
> * * * * *
>
> (k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; * * *
>
> * * * * *
>
> (m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

Section 301, 52 Stat. 1042, 21 U. S. C. 331, provides in pertinent part:

> The following acts and the causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is * * * misbranded.

Section 303 (a), 52 Stat. 1043, 21 U. S. C. 333 (a) provides:

Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

Section 502, 52 Stat. 1050, 1051, 21 U. S. C. 352, provides in pertinent part:

A drug * * * shall be deemed to be misbranded—

* * * * *

(f) Unless its labeling bears (1) adequate directions for use; * * *.

21 C. F. R. § 1.106 provides in pertinent part:

Drugs and devices; directions for use—

(a) *Adequate directions for use.*—"Adequate directions for use" means directions under which the layman can use a drug or device safely and for the purposes for which it is intended. Directions for use may be inadequate because (among other reasons) of omission, in whole or in part, or incorrect specification of:

(1) Statements of all conditions, purposes, or uses for which such drug or device is intended, including conditions, purposes, or uses for which it is prescribed, recommended, or suggested in its oral, written, printed, or graphic advertising, and conditions, purposes,

or uses for which the drug or device is commonly used; * * *.

STATEMENT

Following a jury trial held in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted under a seven-count indictment[2] charging that they introduced certain misbranded drugs into interstate commerce, in violation of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U. S. C. 301, *et seq.*, in that the labels of these drugs failed "to state the purposes, conditions, and diseases for which [they were] intended" (App. 4a–15a). Each count of this indictment referred to petitioner Hohensee's previous conviction in the United States District Court for the District of Arizona, on or about March 8, 1948, for violation of the Federal Food, Drug, and Cosmetic Act (App. 6a, 8a, 9a, 11a, 12a, 13a, 15a). To prevent any prejudice to the petitioners, the trial judge sent to the jury room a photostatic copy of the indictment with the portions relating to the prior conviction blocked out (Tr. 893–895, 1114–1115), and charged the jury that the "* * * indictment and the charges found therein are not evidence" (Tr. 1192). No mention of the prior conviction was made during the trial. After the jury found petitioners guilty as charged, the prior conviction was stipulated to by the parties and evidence on that issue was never presented to the jury (Tr. 1198–1200; App. 2a–3a). Pe-

[2] The indictment originally contained 9 counts. The government withdrew counts 8 and 9 during the trial and before the case was submitted to the jury (Tr. 601).

titioners' motion in arrest of judgment and for a new trial were denied (App. 36a–51a).

On May 25, 1956, petitioner Hohensee was sentenced to imprisonment for one year and one day on each of the seven counts, to run concurrently (App. 4a). Scientific Living, Inc., and El Rancho Adolphus Products, Inc., were sentenced to pay fines of $100 each, on each of the 7 counts of the indictment.

The Court of Appeals for the Third Circuit unanimously affirmed the conviction (Pet. App. 2a–10a).

The evidence adduced at the trial deals with two parallel sets of circumstances, and may be summarized as follows:

Counts I–III

Petitioner Hohensee, who is the president of petitioner Scientific Living, Inc., and empowered to draw checks on the bank account of petitioner El Rancho Adolphus Products, Inc., without counter signature (Tr. 698–699, 722–725), personally visited the Eichenauer Health Food Store in Phoenix, Arizona, some time late in 1951 or early 1952. According to Eichenauer, Hohensee advised him of a series of health lectures he had arranged to deliver in Phoenix, and solicited Eichenauer's assistance in advertising these lectures. Hohensee provided him with leaflets and advertising copy and arranged for Eichenauer to stock El Rancho Adolphus products. These products began to arrive at the Eichenauer store in the latter part of January 1952 (Tr. 13–24, 33–36), and were invoiced from either El Rancho Adolphus Products, Inc., or Scientific Living, Inc. The products

were shipped from Scranton, Pennsylvania (Tr. 43–45, 124–128, 133–137). They were paid for by checks delivered to and made payable to Hohensee (Tr. 61–66).

The leaflets given by Hohensee to Eichenauer for distribution described the lectures as:

> * * * hope-awakening new light on scores of specific conditions which today are the scourge of mankind. What does science say today about * * * Cancer? Diabetes? Rheumatism? Liver Disorders? Chronic Constipation? Colitis? Stomach Ulcers? Kidney Stones? Kidney disease? Morning mouth? Tooth decay? Bleeding gums? Tuberculosis? Sinusitis? Asthma? Common cold? Irritability? Vague pains? Scurvy? Rickets? Beri-Beri? Glaucoma? Neuritis? Cataracts? Sexual impotency? Frigidity in women? Neurotic Symptoms? Heart disease? High blood pressure? Low blood pressure? Rebuilding of blood? Anemia? Arteriosclerosis? Hemorrhages? Insomnia? Fatigue? Foot trouble? Better eyes without glasses? How to conquer premature old age? Better eyes without glasses! A startling revelation by a man who was actually blind! Today he enjoys perfect vision. [Tr. 28–29.]

The advertising copy which Eichenauer placed in local newspapers in late January and early February of 1952 was of similar character (Tr. 16, 107–113).

The lectures were delivered by Hohensee between February 11, and March 6, 1952 (Tr. 210–213). Eichenauer placed a reorder for the Herb Laxative on February 24, 1952 (Tr. 52–53). According to gov-

ernment witness Kimlel, an employee of the United States Food and Drug Administration who attended these lectures, Hohensee repeatedly adverted to the curative effect of Adolphus brand products and distributed literature relating to said products. One of these pamphlets described a diet consisting of El Rancho Adolphus Peppermint Tea (count I) and Adolphus Herbal Laxative (count III). The pamphlet referred to peppermint tea as having been used in "* * * cases of colic, flatulence, headache, rheumatism and for its diuretic qualities," although a footnote further suggested that the purchaser try the diet and form his own opinion since "[t]he effects of Peppermint Tea as outlined above are controversial and contrary to Medical opinion" (Tr. 219–223; Gov. Ex. 24).

Hohensee discussed his treatment of an arthritic with Peppermint Tea, noted that he never failed to cure an arthritic at his ranch, and that if arthritics would follow his directions they would notice a difference within ninety days (Tr. 224). He sold a booklet recommending Adolphus Tea as a part of a diet for high blood pressure (Tr. 225–228; Gov. Ex. 25). Peppermint Tea was further recommended during the lectures as treatment for gall stones, stagnant urine, prostate glands, sore muscles, lumbago, fits, convulsions, tuberculosis, asthma, pin worms, tape worms, and colitis (Tr. 218–219; 227–229; 232–233; 235–236). The audience was told to use only El Rancho Adolphus Tea, available at the Eichenauer Health Food Store (Tr. 229, 232, 241–243).

"Wheat Germ oil"—charged as misbranded in Count II—was recommended, among other things, for the personality glands, heart disease, multiple sclerosis, arthritis, diabetes, high blood pressure, prostate glands, lumbago, sore muscles and impaired hearing (Tr. 236–245). Hohensee refuted a statement of a physician that Wheat Germ Oil was not good for the heart with the comment: "I say it is good. Dr. McVey is dead. He had a heart attack, and here I am giving lectures"(Tr. 240). He advised the audience to use only Adolphus Wheat Germ Oil, for all others would harm the kidneys (Tr. 241). Similarly, Adolphus Herb Laxative (count III) was recommended, among other things, for fits, convulsions, and fainting spells (Tr. 251–253).

An inspector for the Food and Drug Administration purchased these products at Eichenauer's Food Store on March 1, 1952. None of the labels of these products contained any reference to the diseases alluded to in the promotional material and for which they were recommended during the lectures (Tr. 142–147).[2]

Counts IV–VII

The evidence to show misbranding of Adolphus "Concentrated Broth" (count IV), "Whole Wheat" (count V), "Peppermint Tea" (count VI) and "Wheat Hearts" (count VII), followed the same pat-

[2] The only reference to curative effect is found on the left back panel of the label on the Herb Laxative to the effect that "[t]his product is for occasional use to relieve temporary constipation" (App. 9a). As noted above, the herb laxative was recommended, at the lectures, for various other conditions.

tern. These products were shipped from Scranton, Pennsylvania, by Scientific Living Inc. and El Rancho Adolphus, Inc. (Tr. 518–529), and were received at Leed's Health House in Denver, Colorado, during July and August 1952 (Tr. 395–396). They were ordered in connection with a series of lectures delivered by Hohensee from July through September 1952 (Tr. 380, 534). An advance agent of Hohensee made the preliminary arrangements for the lectures, arranged for newspaper advertisements, furnished promotional material for distribution to Mrs. Ethel Barnes, owner of the Leed's Health House, and arranged for her supply of El Rancho Adolphus products sent from Scranton, Pennsylvania—all pursuant to the directions of Hohensee (Tr. 367–388). The Denver newspaper advertisements, as those in Phoenix, made reference to a host of diseases to be discussed at the lectures (Tr. 378–379). Mrs. Barnes testified that some of the merchandise arrived at her store immediately prior to the lectures; that the arrangements were as described by Hohensee's advance agent; that Mrs. Barnes paid for the El Rancho products by checks payable to Hohensee or petitioner El Rancho Adolphus, Inc.; and that these checks were either delivered personally to Hohensee or sent to Scranton (Tr. 390–396; 401–402; 414; 422–423).

The Denver lectures were attended by government witnesses Stroessner and Kramer. According to their testimony, Hohensee distributed literature and made oral representations concerning the curative effects of Adolphus brand products (Tr. 533–694; 727–807). Thus, the Broth was recommended, among other

things, for protruding blood vessels, internal worms, impaired vision, cataracts, glaucoma, fits, convulsions, and epilepsy (Tr. 546–556; 754–759). The Peppermint Tea was advised for treatment of nerves, high blood pressure, heart trouble, as a vaginal douche in the prevention of cancer, worms, colitis, and diabetes (Tr. 561–573; 629–630; 633–634; 678, 734–744; 749–751). The Wheat Hearts were recommended for multiple sclerosis, prostate glands, polio, blood pressure, heart trouble, worms, and prevention of sex crimes (Tr. 574–584; 744–749). The Whole Wheat was recommended for ulcers, cancer, mental instability, and the personality glands (Tr. 556–561; 760). Hohensee advised that only Adolphus brand products should be used, and that they were available at Leed's Health House (Tr. 412, 561). With the permission of Mrs. Barnes, the owner of Leed's store, a government inspector obtained samples of these products on September 3, 1952 (Tr. 424–425; 469–473). None of the products contained any statement on the labeling regarding the diseases for which their curative effect was extolled during the Denver lectures (Tr. 473–477; App. 10a–15a).

During the Denver lectures, Hohensee commented on the work of physicians. For examples, he observed that Wendell Wilkie had been "killed by the medics" (Tr. 658–659); that Hohensee cured a woman that medical doctors had been unable to cure (Tr. 750); that doctors were puzzled by diabetes which was a very simple disease to cure (Tr. 677).

The witnesses testifying on behalf of the petitioner, although denying that Hohensee had made claims

during the lectures as to the curative effect of Adolphus brand products, stated that they had been suffering from various diseases discussed by Hohensee when they attended the lectures; that they had purchased Adolphus brand products and used them; and that they had spent time at Hohensee's health ranch (Tr. 956–975; 963–965; 977–991; 992–1003; 1007–1017; 1017–1021; 1025–1036; 1041–1049; 1061–1062; 1067–1072; 1084–1096).

ARGUMENT

1. Much of petitioners' argument is based on the erroneous assumption that statements made by Hohensee at the various lectures constituted the misbranding for which they were convicted. In truth, evidence of Hohensee's representations at the lectures and the literature he there disseminated, coupled with Hohensee's promotional arrangements, only a few days before the lectures, as well as the sale to the "health" stores of Adolphus products immediately prior to and during the lectures (see the Statement, *supra*, pp. 7, 10), was introduced for the sole purpose of establishing that the products were drugs within the scope of Section 201 (g) of the Act, *supra*, p. 3, when they were introduced in interstate commerce. Petitioners were not indicted or convicted on the charge that the promotional material or Hohensee's representations constituted misbranding. They were indicted and convicted on the charge that the labels of the products constituted misbranding in that they did not state the purposes, conditions, and diseases for which the products were intended, in violation of Section 502 (f) (1) of the Act, *supra*, p. 4.

The relevancy of the curative representations made by Hohensee at the lectures to establish that the products were sold as drugs is clear. In *Kordel* v. *United States,* 335 U. S. 345, this Court, in sustaining a conviction, under Section 301 (a) of the Act, for introducing misbranded drugs into interstate commerce, held that dissemination of misleading and false literature, some of which entered interstate commerce a year and one half after the drugs, was part of the same transaction and constituted the misbranding. It is well within the rationale of that case to say that representations as to the curative effect of products made almost at the same time as the goods entered interstate commerce are relevant for purposes of determining the intended use of the products, particularly when, as here, these representations were part of an integrated distribution program. And it makes no difference whether such curative representations were oral or written. As the First Circuit has recently observed in *V. E. Irons, et al.* v. *United States,* No. 5193, decided April 24, 1957, p. 17:

> Turning now to the second charge contained in each of Counts II–VI of the information, that is, that the articles of drug were misbranded in that their labeling failed to bear "adequate directions for use" for the various diseases and conditions for which they were intended, it may be pointed out that we are free to look to all relevant sources in order to ascertain what is the "intended use" of a drug, and are not merely confined to the labels on the drug or the "labeling". The legislative history of the 1938 Act makes this clear. See

> Dunn, Federal Food, Drug, and Cosmetic Act, 111–12, 240 (1938). Such also has been the undeviating opinion of the courts which have had occasions to deal with the issue. * * * In the present case, therefore, we are entitled to utilize all of appellants' literature as well as the oral representations made by V. Earl Irons at his lectures or by authorized sales distributors.

See, also, *United States* v. *Cruez*, 144 F. Supp. 229 (E. D. Ill.); *United States* v. *3 Cartons, Etc.*, 132 F. Supp. 569 (S. D. Cal.)

Hence, there is no merit to petitioners' contentions that the District Court for the Middle District of Pennsylvania had no jurisdiction over the offense, or that the indictment was invalidly laid under Section 301 (a) of the Act, on the ground that the products could not have been misbranded when they entered interstate commerce (Pet. 22–25).[4]

2. The argument that the convictions violated free speech, on the ground that petitioners were convicted

[4] Nor may petitioners properly rely on the dissent in *Kordel* to support this argument (Pet. 24–25). As we have noted, the majority held that, even though false advertising may have entered interstate commerce subsequent to the drugs they described, such advertising constituted the misbranding, and conviction was proper where the indictment was drawn under Section 301 (a) of the Act. The dissent disagreed on the ground that, in order to sustain a conviction that the advertising constituted misbranding, the indictment (in that case) should have been under Section 301 (k) of the Act which prohibits misbranding while the drugs are held for sale subsequent to interstate shipment. *Kordel* v. *United States*, 335 U. S. 345, 352–353. The dissenters did not reach the question here—the validity of an indictment under Section 301 (a) where representations made almost simultaneous with the shipment of the goods were used to show only that the goods were drugs when they entered interstate commerce.

for Hohensee's representations at the lectures, is specious. Petitioners were not convicted for what Hohensee said (Pet. 19–22), but for having failed properly to label the drugs as required by law.[8]

3. Similarly, petitioners' allegation that the charge against them is within the exclusive jurisdiction of the Federal Trade Commission is fallacious (Pet. 22–23). The truth or falsity of the promotional material was not in issue. The charge is that products sold for use as drugs did not show the diseases for which they were intended. *Alberty Food Products* v. *United States,* 194 F. 2d 463, 464 (C. A. 9); cf. *Kordel* v. *United States,* 335 U. S. 345, 351.

4. Also without merit is the further constitutional objection that, in a criminal prosecution, to construe "adequate directions for use" in Section 502 (f) (1) of the Act, *supra,* p. 4, as requiring a statement of the conditions or diseases for which the drug is intended, renders the statute vague and indefinite (Pet. 14–19).

The administrator of the Act has construed "adequate directions for use" as including a statement of the "purposes for which it is intended", 21 C. F. R. 1.106, *supra,* pp. 4–5. There is nothing uncertain in requiring a person to specify the diseases which he represents a drug will cure. This is also the unanimous view of the courts. *E. g., Alberty Food Products Co.* v. *United States,* 185 F. 2d 321, 326, and

[8] As the trial judge charged (Tr. 1184–1185):

"The defendants are not on trial for advancing certain doctrines and beliefs, but as I have stated are charged with having caused the introduction of misbranded drugs into interstate commerce."

194 F. 2d 463, 464 (C. A. 9) (injunction); *Colgrove* v. *United States,* 176 F. 2d 614 (C. A. 9), certiorari denied, 338 U. S. 911 (injunction—criminal contempt); *United States* v. *Vitamin Industries, Inc.,* 130 F. Supp. 755 (D. Nebr.) (criminal); *United States* v. *150 Packages, Etc.,* 83 F. Supp. 875 (E. D. Mo.) (seizure); *United States* v. *Various Quantities of Articles of Drug,* 83 F. Supp. 882 (D. D. C.) (seizure); cf. *United States* v. *El-O-Pathic Pharmacy,* 192 F. 2d 62, 77 (C. A. 9).

"The high purpose of the Act [is] to protect consumers who under present conditions are largely unable to protect themselves in this field * * *." *Kordel* v. *United States,* 335 U. S. 345, 349. See *United States* v. *Sullivan,* 332 U. S. 689; *United States* v. *Dotterweich,* 320 U. S. 277. Loopholes should not be created by "strained and technical constructions * * *." *Kordel, supra,* at p. 349; *United States* v. *Urbuteit,* 335 U. S. 355, 357–358.

5. Petitioners further contend that it was fatal error to submit to the jury a photostatic copy of the indictment with those portions relating to Hohensee's previous conviction blocked out (Pet. 30–33). This argument is without substance. Pursuant to Section 303 (a) of the Act, *supra,* pp. 3–4, Hohensee's previous conviction was set out in the indictment to permit imposition of the heavier second-offender penalties. This is similar to other statutory schemes. *Singer* v. *United States,* 278 Fed. 415, 420 (C. A. 3), certiorari denied, 258 U. S. 620 (Volstead Act); *United States* v. *Berkowitz,* 45 F. Supp. 564, 565 (W. D. Mo.) (Fair Labor Standards Act). The blocking out of the prior

conviction did not change the offense charged by the grand jury, and petitioners' rights were certainly not prejudiced thereby. Cf. *Ex Parte Bain*, 121 U. S. 1, 13; *United States* v. *Krepper*, 159 F. 2d 958, 970 (C. A. 3), certiorari denied, 330 U. S. 824. On the contrary, by scrupulously keeping knowledge of the prior conviction from the jury, any possibility of prejudice was avoided (see the Statement, *supra*, p. 5). Cf. *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656 (C. A. 2), certiorari denied, 331 U. S. 831, upon which petitioners rely, where the conviction was reversed solely because the prior conviction was made known to the jury.[6]

6. Petitioners also contend that the convictions must be reversed since criminal intent was not established. Criminal intent is not an essential ingredient to establish violation of the Federal Food, Drug, and Cosmetic Act. *United States* v. *Dotterweich*, 320 U. S. 277, 285–286; *United States* v. *Kaadt*, 171 F. 2d 600, 604 (C. A. 7). And this is equally true although Hohensee, in accord with the express mandate of the Act, was convicted of a felony.[7]

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[6] In *United States* v. *Stella D'Orb Biscuit Co.*, 143 F. Supp. 275 (S. D. N. Y.), the court merely indicated that it might be preferable to plead a prior conviction in a separate information in order to bring into operation the more stringent penalty provision of the Act. It was certainly not held that to plead the prior conviction in the same indictment as the offense charged was fatal error.

[7] In *United States* v. *Balint*, 258 U. S. 250, and *United States* v. *Behrman*, 258 U. S. 280, felony convictions were sustained without proof of criminal intent under the 1914 Narcotic Drug Act.

7. Petitioners further allege that the evidence is insufficient to sustain the verdicts (Pet. 25–30). The trial judge and the Court of Appeals found that the verdicts were amply supported by the evidence (App. 41a–51a; Pet. App. 2a–10a), which is summarized in the Statement, *supra*. There is no occasion for further review of the evidence by this Court. *Kann* v. *United States*, 323 U. S. 88, 93; *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589–590.

8. Finally, petitioners contend that there were numerous instances during the trial when their rights were prejudiced. These include, among others, allegedly prejudicial comments by the trial judge and prosecutor; the use of leading questions by the prosecutor; allegedly prejudicial and irrelevant remarks made by the prosecutor during his closing argument; and "the whole climate created by the prosecution" (Pet. 36–44). All of these allegations and others raised by petitioners were examined by the Court of Appeals and found to be without merit (Pet. App. 8a–10a).[8] The short of it is that an examination of the lengthy trial transcript (over 1,000 pages) shows that petitioners were afforded a fair trial.

[8] An instance of the prejudicial error alleged by petititoners involves the trial judge's comments on the cost of the trial (Pet. 39). This was answered by the Court of Appeals as follows (Pet. App. 9a):

"A third objection is voiced to the court's expressions with reference to the cost of the trial. In denying the motions for acquittal, the court did allude to the large trial expense but in its next sentence and the same paragraph stated 'If I determine that I am in error about this (the denial of the motions) at any time I shall gladly grant a new trial, or even enter a

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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MAY 1957.

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judgment of acquittal, if I think I should * * *. Of the two other allusions to trial cost in appellants' appendix, one has to do with the court trying to narrow the trial scope. In the other, the court, at considerable length, rejected the government's plea not to postpone the trial at the defense request. The government urged it had expended large sums of money in preparation. The court concluded its decision to allow the continuance by saying:

"'Now, this all means that the preservation of freedom is very expensive, just like everything else, more so every day, and it always has been. So I am not going to sustain the objections to the motion because of the expense, and I will grant the motion for a continuance, and I will fix November 29, 1954 at 2 o'clock in the afternoon for the trial of this case'."

U. S. GOVERNMENT PRINTING OFFICE: 1957